



## **Recommendation 84-1**

### **Public Regulation of Siting of Industrial Development Projects**

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(Adopted June 28, 1984)

Major industrial development projects often have significant environmental effects and require permit approvals and preparation of environmental reviews by agencies under legislation such as the National Environmental Policy Act (NEPA) and the Clean Air Act. Although governmental permitting and review processes—aimed at protecting the environment, reducing safety risks, and assisting the planning of livable communities—necessarily extend the time required to complete projects, unnecessary delays associated with the complexity of lengthy processes can have serious negative consequences. Project costs can rise dramatically over initial estimates, resulting in increased costs to consumers for the products or services eventually delivered. Project approval delays have led to pressure to circumvent environmental laws by means of special legislation for particular projects or types of projects. The consuming public can further suffer from process delay by being deprived for substantial periods of time—and, in cases of project abandonment caused by delay, forever—of the benefits of emerging new technology. The Administrative Conference<sup>1</sup> believes that, when many agencies at different levels of government must approve a project proposal, the complexity and uncertainty of the process can be reduced through an appropriate degree of interagency coordination and the use of adequate procedures.

#### *Interagency Coordination*

Many Federal, state, and local agencies must review environmentally sensitive industrial projects. Project developers need assistance in determining which agencies must be consulted

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<sup>1</sup> Congress requested the Administrative Conference (ACUS) work cooperatively with the Advisory Commission on Intergovernmental Relations (ACIR) toward resolving regulatory conflicts and overlap among federal, state, and local agencies. ACUS and ACIR were specifically asked to address the issue of streamlining the permit process based on approaches that lead to improved intergovernmental cooperation. Congress was concerned with the complexity and costs associated with the permit process in the review of energy and port development projects. Congress expects ACIR and ACUS to work together to assess alternative ways to resolve intergovernmental problems and conflicts in permitting. In conducting this joint effort, the agencies have sought and will continue to seek the input of business, government and environmental experts, House Committee on Appropriations, Report on Treasury, Postal Service, and General Government Appropriation Bill 1983, H.R. Doc. No. 854, 97<sup>th</sup> Cong., 2<sup>nd</sup> Sess. 39 (1982). ACIR has cooperated in the development of this recommendation, but has not formally adopted the recommendation at this time.



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for project approval, what permits are required, what applications must be completed, and what information is need for each application. Developers' informational needs could be met by a clearinghouse established at the level of government closest to initial project review.

When relatively few agencies must consider a project application, agreements can be worked out among the agencies to coordinate agency review or to resolve jurisdictional or interpretative conflicts. These agreements can facilitate more timely project review, reduce overlapping review, decrease uncertainty, and provide for joint State-Federal agency review of a project.

When many agencies with different responsibilities, distinct agency missions, and different governing statutes must approve a project proposal there is a strong need for coordination. Selection of a coordinating agency early in the application process is desirable to facilitate the permitting process. The coordinating agency can facilitate the exchange of information, can encourage more efficient review, and can reduce the mistrust by scheduling regular face-to-face meetings among the project developer, governmental agencies, interest groups, and residents of the community in which a project is to be located. The coordinating agency often will have permitting duties but may be a non-permitting body .such as the Colorado Joint Review Process.<sup>2</sup> To be effective a non-permitting body must be supported by key government leaders in the jurisdiction. The coordinating agency may be a body different from the clearinghouse agency or the lead agency for environmental review preparation.

### *Public Participation*

Citizens of the community in which a project is to be sited have a strong interest in the project and will seek information about the project particularly when it has major environmental effects. Environmental groups and other members of the public also have similar interests. Severely limiting legitimate public participation can unnecessarily increase opposition to a project and can lead to lawsuits to stop a project. Facilitating public participation can

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<sup>2</sup> The Colorado Joint Review Process (JRP) is an innovative new approach to coordinating governmental review of energy "projects. Originally part of the Colorado Department of Natural Resources, it is now a wholly separate body, fully supported by the Governor and other key state officials. The JRP has no permitting responsibilities but performs a coordinating role and operates on a voluntary basis. A developer must choose to have its project application accepted into the JRP. The JRP works with the developer, the public, and all levels of government to identify affected agencies and permit processes, to determine what environmental and other issues must be addressed, to clarify what information is necessary, and to establish a decision schedule for all governmental review processes that must be completed for that project. The JRP sponsors periodic meetings with all affected actors and otherwise seeks to ensure a smoother and more organized review.



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reduce fears and concerns, can mitigate the not-in-my-backyard attitude of a community, and can lessen public mistrust of the developer and government. The public can also contribute useful information to a project. Developers can allay concerns by sharing information about their project with the public and can work more effectively by cooperating with the community in which a project is to be sited. Public participation at an early stage of agency review ensures that changes can be made before substantial developer funds are committed to a specific project design. Public participation can be enhanced when meetings or hearings are held in the project community and when the agency designates a public advisor to help citizens understand the process.

### *Environmental Review*

Under the provisions of NEPA and similar state legislation, environmental reviews often must be prepared by agencies prior to approving a project application. When both Federal and state environmental review statutes apply to a project application, preparing a joint review can reduce duplication and overlap. The approach taken in the regulations of the Council on Environmental Quality—in which a "lead agency" is designated to coordinate the preparation of an environmental impact statement—provides an excellent model adaptable even when there is no major Federal interest in a project. Early identification of environmental impacts through the "scoping of issues" process facilitates statutory compliance and allows project changes by a developer when they are least expensive. Identifying commenting agencies early in the process ensures that the concerns of every agency are addressed in the review. Face-to-face meetings of all participants in the review process are useful for identifying impacts, exchanging information, and getting to know the other participants in the process and their concerns. The lead agency can ensure a more timely review process by negotiating a decision schedule—in which a completion date for each step of the process is agreed upon—with the project proponent, other agencies, and representatives of other identified interested groups. The lead agency can play a major coordinating role by identifying other agencies, setting up meetings, organizing the stages of review preparation, and negotiating decision schedules for each stage.

### *Permit Approvals*

Developers must file applications in which they provide information about their project. Developers and agencies may disagree as to what information is required and how much information is adequate for a complete application. There may also be uncertainty over procedural and substantive requirements that must be met. Agencies can assist developers by specifying in advance the information needed for an application to be complete and the



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standards that must be met for a permit to be approved. The agency can clarify what is required by holding pre-application meetings with developers. The agency can resolve informational, procedural, and substantive problems by holding post-application meetings with the developer. Agencies need adequate information and full cooperation from developers to make permitting or compliance decisions. Duplication, overlap, and paperwork can be reduced if agencies with joint permit responsibilities for a project adopt common application requirements, standardized information requirements, and common procedures such as joint hearings. Sharing of staff and budgetary resources can make these approaches easier to implement.

### *Time Limits for Decisionmaking*

Legitimate concerns are expressed by developers and others that too much time is required by agencies to review and permit major industrial projects. Legislatures have reacted by passing time limit statutes that mandate an agency's preparation of an environmental review or action on a permit application within a set period of time.<sup>3</sup> When setting a time limit by statute, a legislature must be sensitive to the agency's needs by allowing in the statute sufficient time to complete the decision—including time that may be required for action by other agencies that have concurrent review responsibilities, by giving the agency adequate resources, and by allowing the agency flexibility to extend the deadline for good cause. Agencies often have the most knowledge about how long a particular type of decision can take, and agencies can specify by regulation an appropriate time limit. Agency compliance with time limit statutes can be monitored if the legislature requires agencies periodically to report their performance under the statute and to identify any problems encountered in meeting the time limits.

An alternative to mandated statutory time limits is a requirement that agencies establish decision schedules which set deadlines for the completion of specific actions (e.g., comment periods, drafting of required agency reports) within each phase of project review. A decision schedule is desirable because it is individualized for each project and because it requires the developer and all responsible agencies to make commitments to meet the agreed schedule. Commitment by the developer is crucial since developers can speed up or slow down development of a project depending upon internal or external economic considerations. Also

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<sup>3</sup> In Recommendation 78-3 the Conference stated: "Congress ordinarily should not impose statutory time limits on an agency's adjudicatory proceedings. Statutory time limits may be appropriate, however, when the beneficial effect of agency adjudication is directly related to its timeliness, as may be true in certain licensing cases or in clearance of proposed private activity where a delayed decision would deprive both the applicant and the public at large of substantial benefit." 1 CFR 305.78-3, para. 3. These concerns for timeliness are particularly pertinent here.



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some agencies may not be sufficiently committed to timeliness; if agencies are required to agree to a schedule, they are more likely to make that commitment.

### **Recommendation**

These recommendations are directed primarily to Federal, state, regional, and local agencies that have permitting and environmental review responsibilities. In addition, many of the time limit recommendations are directed to Congress and state legislatures. To the extent statutory changes are necessary to implement the other recommendations, they are also directed to the appropriate legislative bodies.<sup>4</sup>

#### **A. Interagency Coordination**

1. Clearinghouses should be established at the level of government closest to initial review of a particular project to provide information to project developers about applications, agencies to be consulted, and permitting requirements.

2. Agencies should make agreements to coordinate review of a particular project, or to resolve jurisdictional or interpretive conflicts.

3. A coordinating agency should be selected to coordinate governmental review of projects when many agencies are involved. The coordinating agency may be either a permitting or a non-permitting agency.

4. The coordinating agency should schedule regular face-to-face meetings among developers, agencies, and the public.

5. The Colorado Joint Review Process approach (note 2, *supra*) in which a non-permitting agency coordinates project review by all agencies is one possibility that should be considered.

#### **B. Public Participation<sup>5</sup>**

1. In order to facilitate approval processes, agencies with permitting and environmental review responsibilities should solicit and consider the views of public participants, including citizens of the community in which a project is to be sited.

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<sup>4</sup> See statement regarding joint ACUS-ACIR effort in note 1.

<sup>5</sup> This part does not overrule or supersede Recommendation 71-6: Public Participation in Administrative Proceedings (1 CFR 305.71-6).



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2. To make public participation more meaningful, agencies should develop procedures such as holding local meetings or hearings and designating public advisors who can provide assistance on procedural aspects of agency proceedings to participants.

3. Agencies should encourage developers to provide information to the community about a project application and to be responsive to legitimate community concerns.

4. Agencies should ensure that public participation occurs at an early stage of project review and developer planning so that changes in project design can be made before substantial funds are committed to a specific project design.

### **C. Environmental Review**

1. When several agencies are involved in environmental review preparation for a single project, a lead agency (Federal, state, regional, or local, as appropriate) should be designated to coordinate the activities. The approach taken in the regulations of the Council on Environmental Quality (40 CFR parts 1500-1508) is recommended, even when a formal environmental impact statement is not required.<sup>6</sup>

2. The lead agency should identify commenting agencies and should schedule face-to-face meetings of all participants in the review process.

3. The lead agency should utilize the scoping of issues process to identify environmental impacts early in the review process before a draft review is prepared.

4. The lead agency should negotiate decision schedules—setting deadlines for completion of scoping, draft review preparation and comments, final review preparation and comments, and issuance of a review—with the developers, all affected agencies, and representatives of other identified interested groups.

5. When appropriate, agencies should agree to prepare joint state-federal environmental reviews.

### **D. Permit Approvals**

1. Whenever feasible permitting agencies should specify in advance what informational, procedural, and substantive requirements will apply to a particular permit application.

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<sup>6</sup> The Conference is not suggesting that an environmental impact statement be prepared when none is required by law, but only that, if environmental review is to involve several agencies, a lead agency be selected.



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2. Agencies should be available for pre-application meetings with the project developer to clarify informational, procedural, and substantive requirements.

3. Within a short period of time after the filing of an application, agencies should determine whether the application is complete. Agencies should hold post-application meetings with developers to discuss procedural, informational, and substantive deficiencies in an application, and should promptly advise developers of any deficiencies throughout the pendency of the permitting process.

4. Agencies should make clear to developers that the developers must supply necessary information in an application and that their cooperation will greatly assist in the permitting process.

5. Whenever feasible, agencies with joint permitting responsibility for a project should be encouraged to reduce duplication and paperwork by accepting common applications, by standardizing informational requirements, by using in one agency proceeding relevant information developed in the proceeding of another agency, and by adopting common procedures such as joint hearings.

### **E. Time Limits For Decisionmaking<sup>7</sup>**

1. Agencies should negotiate a decision schedule with the project developer, all affected agencies, and representatives of other identified interested groups within existing statutory deadlines. The schedule should set a deadline for the completion of specific stages of project review. The schedule should be contained in an agreement in which the developer and the agencies make a commitment to meet the deadlines.

2. If a legislature<sup>8</sup> wishes to limit the time available for a proceeding, it is preferable that the statute require the agency to fix the time limit by rule, rather than to specify the time limit in the statute itself.

3. A legislatively mandated time limit should allow an appropriate amount of time for the type of decision involved, should specify the consequences of not meeting the time limit, and should provide the agency with the option of extending the time limit for good cause explicitly stated.

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<sup>7</sup> See generally, Recommendation 78-3: Time Limits on Agency Action (1 CFR 305.78-3), which is consistent with this part.

<sup>8</sup> As used here, "legislature" includes Congress, as well as state, regional, and local legislative bodies.



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4. Legislatures should provide adequate resources for agencies to meet time limit requirements and should periodically review agency compliance with time limits.

### **Citations:**

49 FR 29938 (July 25, 1984)

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